

**United States Department of Labor
Employees' Compensation Appeals Board**

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| J.G., Appellant |) | |
| |) | |
| and |) | Docket No. 23-0905 |
| |) | Issued: December 11, 2023 |
| U.S. POSTAL SERVICE, COLUMBUS |) | |
| PROCESSING & DISTRIBUTION CENTER, |) | |
| Columbus, OH, Employer |) | |
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Appearances:
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On June 21, 2023 appellant, through counsel, filed a timely appeal from a June 6, 2023 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant has met his burden of proof to establish greater than two percent left lower extremity permanent impairment, for which he previously received a schedule award.

FACTUAL HISTORY

This case has previously been before the Board on a different issue.³ The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On January 26, 2010 appellant, then a 36-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on that date he strained his left upper leg and thigh when the anti-fatigue mat he was standing on slipped out from under him while in the performance of duty. OWCP accepted the claim for left hip and groin strains.

In a report dated March 24, 2022, Dr. Rohn T. Kennington, a physician Board-certified in family medicine and emergency room medicine, reviewed appellant's medical history and provided physical examination findings. He performed range of motion (ROM) testing for the left hip and found mildly decreased ROM. Dr. Kennington reported moderate tenderness on palpation of the medial aspect of the left proximal thigh and into the left groin region. He opined that appellant had reached maximum medical improvement (MMI) on March 24, 2022. Utilizing the diagnosis-based impairment (DBI) rating method of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A.),⁴ Dr. Kennington identified the class of diagnosis (CDX) for hip strain with mild motion deficits as a Class 1 impairment with a default value of grade C or five percent permanent impairment under Table 16-4 (Hip Regional Grid), page 512. He assigned a grade modifier for functional history (GMFH) of 1, in accordance with Table 16-6, page 516, as appellant had a mild deficit, and a grade modifier for clinical studies (GMCS) of 1 in accordance with Table 16-9, page 519, as diagnostic studies showed a mild problem. Dr. Kennington noted that a grade modifier for physical examination (GMPE) was not applicable since it was used to determine the CDX. He calculated that appellant had a net adjustment of 0, resulting in no movement from the default value of grade C and corresponding to five percent permanent impairment of the left lower extremity.

On April 13, 2022 OWCP referred appellant's case to Dr. James W. Butler, an orthopedic surgeon serving as an OWCP district medical adviser (DMA), and requested that he provide an opinion regarding Dr. Kennington's permanent impairment rating. In an April 27, 2022 report, Dr. Butler agreed with Dr. Kennington's date of MMI. He identified the CDX for hip strain with mild motion deficits as a Class 1 impairment with a default value of grade C or two percent permanent impairment under Table 16-4, page 512. Dr. Butler assigned a GMCS of 1 based on findings of mild pathology and clinical studies confirming diagnosis. He assigned a GMFH of 1 for mild gait derangement and a GMPE of 2 for moderate palpatory findings and observed

³ Docket No. 11-875 (issued January 13, 2012).

⁴ A.M.A., *Guides* (6th ed. 2009).

abnormalities. Dr. Butler found that appellant had a net adjustment of +1, resulting in a movement from the default value of grade C to D and corresponding to a two percent permanent impairment of the left lower extremity.

On May 25, 2022 Dr. Kennington reviewed Dr. Butler's permanent impairment rating and noted the primary difference in their impairment ratings was the initial assignment for CDX using the DBI method. He noted that he placed the diagnosis in CDX of 1 with midrange default value of five percent based on appellant's physical examination findings of significant left hip weakness while Dr. Butler identified a CDX of 1 with midrange default value of two percent for mild motion defects. Dr. Kennington argued that weakness of 4/5+ left hip girdle musculature strength does represent significant weakness and a default midrange value of five percent. He observed that Dr. Butler agreed with the remainder of his report and noted his opinion that appellant's five percent left lower extremity permanent impairment remained unchanged.

In a June 5, 2022 addendum, Dr. Butler reviewed Dr. Kennington's May 25, 2022 regarding the discrepancy between the two impairment calculations. He explained that according to Table 16-11, page 533 that a 4/5 motor deficit is rated as mild weakness and severity of 1. In addition, appellant's ROM findings showed mild motion deficit according to Table 16-24, page 549. Thus, Dr. Butler found no evidence of significant weakness, which is why he used mild loss of ROM.

By decision dated October 27, 2022, OWCP granted appellant a schedule award for two percent left lower extremity permanent impairment. The period of the award ran for 5.76 weeks from March 24 to May 3, 2022.

On November 8, 2022 appellant, through his representative, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on April 13, 2023.

By decision dated June 6, 2023, OWCP's hearing representative affirmed the October 27, 2022 schedule award decision.

LEGAL PRECEDENT

The schedule award provisions of FECA⁵ and its implementing regulations⁶ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. FECA, however, does not specify the manner in which the percentage of loss of a member shall be determined. The method used in making such determination is a matter which rests in the sound discretion of OWCP. For consistent results and to ensure equal justice, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified

⁵ *Supra* note 2.

⁶ 20 C.F.R. § 10.404.

edition of the A.M.A., *Guides*, published in 2009.⁷ The Board has approved the use by OWCP of the A.M.A., *Guides* for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.⁸

In determining permanent impairment of the lower extremities under the sixth edition of the A.M.A., *Guides*, an evaluator must establish the appropriate diagnosis for each part of the lower extremity to be rated. With respect to the hip, the relevant portion of the leg for the present case, reference is made to Table 16-4 (Hip Regional Grid) beginning on page 512.⁹ After the CDX is determined from the Hip Regional Grid (including identification of a default grade value), the net adjustment formula is applied using GMFH, GMPE, and GMCS. The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).¹⁰ Under Chapter 2.3, the evaluators are directed to provide reasons for their impairment rating choices, including the choices of diagnoses from regional grids and calculations of modifier scores.¹¹

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to a DMA for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the DMA providing rationale for the percentage of impairment specified.¹²

ANALYSIS

The Board finds that appellant has not established greater than two percent permanent impairment of the left lower extremity, for which he previously received a schedule award.

Dr. Kennington provided a permanent impairment rating of five percent for the left lower extremity. He identified a CDX for hip strain with mild motion deficits placed appellant in a Class 1 impairment with default value of grade C or five percent permanent impairment under Table 16-4, page 512. Dr. Kennington assigned a GMFH of 1, in accordance with Table 16-6, page 516, as appellant had a mild deficit, and a GMCS of 1 in accordance with Table 16-9, page 519, as diagnostic studies showed a mild problem. He noted that a GMPE was not applicable since it was used to make the diagnosis. Dr. Kennington calculated that appellant had a net adjustment of 0, resulting in no movement from the default value of five percent permanent impairment of the left lower extremity. The Board notes that Dr. Kennington's findings of mild motion and functional

⁷ For decisions issued after May 1, 2009, the sixth edition of the A.M.A., *Guides* is used. A.M.A., *Guides* (6th ed. 2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); *see also id.* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

⁸ *D.M.*, Docket No. 21-1209 (issued March 24, 2022); *L.E.*, Docket No. 20-1505 (issued June 7, 2021); *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

⁹ A.M.A., *Guides* 512-515 (6th ed. 2009).

¹⁰ *Id.* at 515-522.

¹¹ *Id.* at 23-28.

¹² *See supra* note 5 at Chapter 2.808.6f (March 2017).

history deficits would place appellant in a CDX of 1, with a default value of two percent. However, in an addendum dated May 25, 2022, Dr. Kennington explained that his placement of appellant's impairment in a CDX of 1 with midrange default value of five percent was based on significant left hip weakness.

In assessing the left hip, the DMA, Dr. Butler, referred to Table 16-4, pages 512-15, the Hip Regional Grid, and noted that a CDX for left hip with mild motion deficits placed appellant in a Class 1 impairment with a default value of two percent impairment. He noted that the physical examination findings showed a moderate palpatory findings supported by observed abnormalities resulting in a GMPE of 2. The DMA assigned a GMFH of 1 based on mild gait derangement, and a GMCS of 1 based on mild pathology and confirmation of diagnosis by clinical studies. The DMA calculated a Net Adjustment of +1 (GMFH of 1 - CDX of 1) + (CMPE of 2 - CDX of 1) + GMCS of 1 - CDX of 1) for a final rating of CDX of 1, grade D, or two percent permanent impairment of the left lower extremity impairment. In his June 5, 2022 supplemental report, the DMA further explained that according to Table 16-11, page 533 a Grade 4/5 motor deficit, as noted by Dr. Kennington, was classified as mild GMFH with a severity of 1 and not a moderate problem with a severity of 2 as found by Dr. Kennington. Appellant's impairment was therefore rated for mild motion deficits, and not moderate motion or significant weakness and the proper default rating was therefore two percent, not five percent.

The Board finds that the DMA, Dr. Butler, properly applied the standards of the A.M.A., *Guides* to the physical examination findings and reports of Dr. Kennington to find that appellant had two percent permanent impairment of the left lower extremity. The DMA accurately summarized the relevant medical evidence, including findings on examination, and reached conclusions regarding appellant's condition that comported with those findings. Thus, appellant has not established greater than two percent permanent impairment of his left lower extremity for which he previously received a schedule award.

Appellant may request a schedule award or increased schedule award at any time based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased permanent impairment.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish greater than two percent permanent impairment of his left lower extremity, for which he previously received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the June 6, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 11, 2023
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board